

FREDERICK P. DUNDER

IBLA 74-270

Decided September 10, 1974

Appeal from decision by Alaska State Office, Bureau of Land Management, approving in part and rejecting in part an application (A-057994) to purchase a trade and manufacturing site.

Set aside and remanded.

Alaska: Trade and Manufacturing Sites

On appeal from the partial rejection of a trade and manufacturing site application, the case will be remanded for a hearing when there is a dispute as to the facts as to the amount and the exact location of the acreage that has been used and occupied for the purpose of trade, manufacture or other productive industry.

Administrative Practice--Administrative Procedure: Adjudication--Alaska: Trade and Manufacturing Sites

A report of a field examination, although a proper basis for charges, notice and a hearing, is not, by itself, without a hearing, to be used as evidence for rejecting a trade and manufacturing site purchase application in part. The Bureau of Land Management should bring a contest to reject such an application in whole or in part if the applicant has shown prima facie compliance with the law.

APPEARANCES: Frederick P. Dunder, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Frederick P. Dunder has appealed to this Board from a decision of the Alaska State Office, Bureau of Land Management, dated March

21, 1974, which rejected in part his application to purchase a trade and manufacturing site. The application was rejected as to a 65-acre portion of the 80-acre site based on a finding that there was no evidence of past or current use or occupancy of that area for the purpose of trade, manufacture or other productive industry. The application was approved as to the remaining 15 acres.

Mr. Dunder filed an application on September 19, 1967, to purchase an 80-acre trade and manufacturing site located in the SW 1/4 NE 1/4, and SE 1/4 NW 1/4 of Section 32, T. 22 N., R. 4 W., Seward Meridian. He claimed improvements on the site of three log cabins, two frame buildings, a root cellar, and picnic areas of which he estimated the value of \$ 8,000. He stated that 40 acres are occupied by these improvements which he uses for cabin rental and recreation area.

On October 5, 1973, the Bureau of Land Management conducted a field investigation. The realty specialist conducting the examination verified the existence of the applicant's improvements and confirmed the use and occupancy for cabin rentals. However, the report concluded:

The applicant has shown that there are five cabins on the subject land. One of these cabins has been used as his residence, one has never been rented, and the other three cabins have been rented. Each of the rented cabins has had only one or two renters. The cabins have been rented to the same individuals for a number of years. The applicant has submitted customer statements showing that an income of \$ 2,200 was generated from the rental of the cabins to three different customers. The productivity of the business is questionable because of the limited clientele using the business site. However, the substantial income cannot be questioned. The examiner believes that the applicant has made substantial compliance on a 15 acre portion of the T&M site area. This compliance has been very marginal but is acceptable. The remainder of the T&M site area has not been used in the conduct of a business. There are no improvements or claimed use on this area except for woodcutting by the applicant.

The State Office adopted these recommendations, limiting the approval of the application to 15 acres.

Appellant's application was filed pursuant to Section 10 of the Act of May 14, 1898, 43 U.S.C. § 687a (1920), which provides:

Any citizen of the United States \* \* \* in the possession of and occupying public lands in Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person, association, or corporation, at \$ 2.50 per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry \* \* \*. (Emphasis added.)

The regulations, 43 CFR 2562.3(d)(1), also require that the application to purchase must show "[t]hat the land is actually used and occupied for the purpose of trade, manufacture or other productive industry \* \* \*." (Emphasis added.)

Appellant's application on its face alleges use and occupancy of 40 acres for the purpose of cabin rental and a recreation area. He cites substantial improvements which have returned an income. The Bureau has recognized this activity as a sufficient commercial use of the trade site under the law. However, there remains a conflict of record as to how much area is actually used and needed for the purpose of the applicant's business.

This Board has held in cases of this nature that the applicant is entitled to a hearing if he disputes the facts upon which the charges of insufficient compliance or noncompliance with the law are based. Martha J. Jillson, 6 IBLA 150 (1972). Where a purchase application for a trade and manufacturing site and supplemental showings show prima facie compliance with the law, the application should not be rejected either in whole or in part by a land office decision relying on a report of a field investigation of the site as contradicting the asserted facts. A report of a field examination is a proper basis for bringing charges, notice, and a hearing, but should not serve alone as the evidentiary basis for a final action of cancellation in the absence of a hearing being afforded. Martha J. Jillson, supra, at 151, and cases cited therein. See also Lance H. Minnis, 6 IBLA 94 (1972); and Don E. Jonz, 5 IBLA 204 (1972).

On appeal Dunder disputes the facts on which the Bureau has based its decision. He states "I have good reason to believe

that all improvements are not included in the allotment." He encloses a drawing in which he indicates that a root cellar and covered spring may have been eliminated from consideration as part of the trade site. He also questions whether they have properly located his cabins, certain trails and cleared areas within the allotted area of the 15 acre site. Mr. Dunder's drawing conflicts with the sketches made by the Bureau's recreational specialist during his field examination. He also states he has used and will continue to need additional area for the cutting of firewood. The use of an area of public land as a source of firewood for a cabin rental business is not a qualifying use under the Trade and Manufacturing Act (supra). Omar Stratman, 16 IBLA 222 (1974).

Appellant takes exception to the Bureau's determination, claiming he is entitled to a minimum allotted area of 60 acres. In view of the established contest procedure set forth in the Jillson case the decision appealed from must be set aside and remanded to the Bureau for further consideration. See also Lloyd Schade, 12 IBLA 316 (1973).

If the parties cannot agree as to the area for which Dunder has satisfied the law and the Bureau decides a further contest is warranted against the purchase application, then a hearing must be held to determine the conflicting facts. At such a hearing the appellant would bear the ultimate burden of presenting evidence of facts to establish that the requirements of the law have been met. Lance H. Minnis, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to the Bureau for action consistent with this decision.

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Martin Ritvo  
Administrative Judge

We concur:

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Joseph W. Goss  
Administrative Judge

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Joan B. Thompson  
Administrative Judge

